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IN THE SUPREME COURT OF THE UNITED STATES

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NO. 79-5267

OCTOBER TERM, 1978

ORIGINAL COPY

ANTONIO PEREZ,

Petitioner,

-vs-

LOUIE L. WAINWRIGHT,
Secretary, Department of
Offender Rehabilitation,

Respondent.

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REPLY BRIEF OF PETITIONER

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INTRODUCTION

This reply brief of Petitioner Antonio Perez to the Brief In Opposition To Petition For A Writ Of Certiorari filed by the Respondent Louie L. Wainwright, Secretary, Department of Corrections, is hereby submitted pursuant to Rule 24(4) and Rule 47 of the Rules of the Court.

In this brief, the Petition For Writ Of Certiorari will be referred to as "Petition", pertinent portions of the Appendix thereto will be referred to by the symbol "App." and the Brief In Opposition filed by the respondent will be referred to as "Response".

ARGUMENT

Respondent cannot and does not refute the claim of petitioner in support of certiorari review of this case. Respondent simply ignores the conflict which exists among the circuits and the significance of the constitutional issue presented.

Instead, respondent suggests four alternative reasons why certiorari should be denied. Examination of these reasons reveals that respondent has replied to an issue never raised, misconstrued both the legal and factual claims to be resolved, and ultimately retreated to an exhaustion of remedies contention directly contravened by law. The reasons posed for a denial of certiorari are therefore manifestly insufficient, indeed, manifestly irrelevant.

Respondent first suggests that petitioner is raising a novel issue before this Court, an attack upon the standard employed by the Fifth Circuit in reviewing claims of ineffectiveness of retained counsel. (Response at 7-10). But in so arguing, respondent has entirely misconceived the contention petitioner advances. Petitioner is not presenting a challenge to the standard of review adhered to by the Fifth Circuit; nor is petitioner conceding that he was not entitled to relief under the standards employed by that court. Petitioner is contending, as he has throughout the prior proceedings, that he is entitled to relief under either of the two standards articulated by the Fifth Circuit: the standard derived from the right to counsel guarantee of the incorporated

Sixth Amendment, and the "fundamental fairness" standard embodied in the Due Process Clause of the Fourteenth Amendment.

And indeed, the court below agreed with petitioner's claim to habeas corpus entitlement under the most stringent "fundamental fairness" analysis.

> What is or is not "fundamental unfairness" cannot of course be identified by litmus. Ultimately the characterization is visceral and emotional. Indeed the very term "fundamentally unfair" has pejorative overtones. Were we approaching the issue for the first time, we would hold, as did the district judge, that, when a lawyer, by definition a member of a learned profession and a member of the bar of the court, does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal. (App. A at 5)

This application of the "fundamental fairness" standard could not be followed by the court below, not due to any flaw in the standard itself, but rather, due to prior misapplications of that standard by other panels of the court. Indeed, the court below graphically so explained, "Our sentiments are repressed by our duty to adhere to the prior decisions that we cannot distinguish." Ibid.

Yet, the interpretation of the "fundamental fairness" standard which would have been applied but for the inconsistent prior decisions of the Fifth Circuit, is in precise accordance with the construction provided the fundamental due process guarantee by the Courts of Appeals for the Second, Third, and Eighth Circuits in the decisions previously cited in support of petitioner's conflict claim. (Petition at 10-12). The deprivation at issue, occasioned by transgressions vastly exceeding the scope of mere ineffective conduct by counsel, can be resolved without reconstruction of the standards enunciated by the Fifth Circuit. This, at least, the decisions relied upon by petitioner conclusively demonstrate.

Respondent secondly contends that it would be imprudent for this Court to establish a standard of review of competency of appellate counsel before an elucidation of the review standard of competency of trial counsel is provided. (Response at 11-13). Again, respondent misconceives the narrow issue presented, and the total deprivation suffered.

Petitioner, as the result of counsel's fraudulent misrepresenta-

tion, received no appellate review of his criminal conviction and sentence. Thus, this is not a case requiring the resolution of the standard of measure to gauge effective appellate representation. There are no calls of judgment to be reviewed, no defense tactics to be explained. Petitioner did not receive "ineffective" appellate review as a result of "ineffective" appellate representation. Petitioner received no appellate review as the result of counsel's total failure to provide appellate representation. Counsel's failure to act, in derogation of his promise made and the ethics his profession mandate, requires relief under any measure.

Thus, the second claim raised by respondent is answered by its own recognition that "this Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (Response at 13)(citations omitted). Indeed, this basic tenet, adhered to previously by this Court in providing relief on the claim of ineffective representation of counsel, see Holloway v. State of Arkansas, 435 U.S. 475, 484 (1978), also vitiates the third reason for delay advanced by respondent; there is no reason for this Court to postpone judgment until lower courts consider the impact of Faretta v. California, 422 U.S. 806 (1975). (See Response at 14-17). Assuming that the waiver analysis of the Faretta decision could have some plausible relevance to the issue of competency of retained counsel,[1] the facts of this case belie any assertion of waiver.

In fact, the district court long ago resolved this factual issue contrary to respondent by concluding that petitioner had at all times desired an appeal and had had his appellate right thwarted only due to the fraudulent misrepresentation of the counsel upon which he had detrimentally relied:

> Significant to the court's determination, examination of the record and the findings of fact reveal that petitioner's privately retained counsel indicated to the state trial court at the sentencing proceeding that a notice of appeal had been filed, and further indicated to the petitioner subsequent to that proceeding that he would be prosecuting petitioner's appeal for him. No further contact was had between petitioner and his attorney, and no action was ever taken by counsel to perfect or prosecute petitioner's appeal. Petitioner was at all times indigent, albeit managed to obtain a private attorney at trial only through the assistance of his parents. He at all times relied on his attorney to perfect and prosecute his appeal. (App. G at 3)

Waiver of the right to counsel not being a factual issue in this case, the Faretta decision can erect no bar to the resolution of petitioner's narrow claim.

The final contention advanced by respondent to bar a review on the merits must also be laid to rest. The doctrine of exhaustion of state remedies in no way requires a petitioner to revisit the state courts after appropriately exhausting state remedies even where a modification of state law has been firmly effected subsequent to the denial of relief by the state courts. Francisco v. Gathright, 419 U.S. 59 (1974); Roberts v. LaValle, 389 U.S. 40 (1967). It follows that a petitioner cannot be required to proceed with re-exhaustion of state remedies on the basis of mere speculation that the state may modify its substantive law. (See Response at 17-24). The exhaustion argument of respondent is wholly specious.

Petitioner's claim, having been appropriately advanced in the lower courts, is ripe for certiorari review. The direct conflict between the decision below and the decisions of the courts of appeals upon which petitioner has relied is irrefutable.

The right to an appeal is a right accorded by every state in the United States. Griffin v. Illinois, 351 U.S. 12, 18 (1956). This right has been declared a vital component of the legal fiber that ensures the integrity of the fact finding process. See Arsenault v. Commonwealth of Massachusetts, 393 U.S. 5, 6 (1968); Tehan v. United States, 382 U.S. 406, 416 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, supra; Frank v. Mangum, 237 U.S. 309, 327 (1915). If that right is to be truly meaningful, if the criminal justice system is to

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[1] Of course, the notion that a defendant can waive the right to counsel or the right to the effective assistance of counsel, be it appointed or retained, is not a new proclamation. Holloway v. State of Arkansas, supra at 483, n. 5; Glasser v. United States, 315 U.S. 60, 70 (1942).

be fairly administered, a defendant cannot be unknowingly stripped of that right by the deceptions of counsel. Where as here a man's liberty is at stake, that he was deceived by retained counsel cannot justify a result such as this. Fundamental fairness compels relief.

CONCLUSION

The significance of the question presented is evident. The need for harmonization of the decisions of the courts of appeals is beyond question. The Writ of Certiorari should issue.

Respectfully submitted,

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